

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 ANDREAS PEFANIS, on behalf of
himself and others similarly
situated,

5 Plaintiff,

6 v. 08 CV 002 (DLC)

7 WESTWAY DINER, INC.,

8 Defendant.

9 -----x

10 New York, N.Y.
11 August 7, 2009
12 2:08 p.m.

13 Before:

14 HON. DENISE COTE,

15 APPEARANCES (via teleconference)

16 JOSEPH & HERZFIELD LLP
17 Attorneys for Plaintiff
18 BY: MAIMON KIRSCHENBAUM, ESQ.

19 ARTHUR HARVEY FORMAN, ESQ.
20 Attorney for Defendant

21

22

23

24

25

987GPEFC

1 (In chambers)

2 THE COURT: Good afternoon, counsel.

3 MR. KIRSCHENBAUM: Good afternoon, your Honor.

4 MR. FORMAN: Your Honor, Arthur Forman for the
5 defendant.

6 THE COURT: And we have Mr. Kirschenbaum for the
7 plaintiff?

8 MR. KIRSCHENBAUM: Yes, your Honor.

9 THE COURT: I have you on the speakerphone because I
10 have my law clerk with me and a court reporter. So before you
11 speak, I'm going to ask you to identify yourselves so that the
12 record is clear, and also please be careful not to interrupt
13 each other, because it's difficult on a conference call to keep
14 the record clear when two people are speaking at the same time.

15 I wanted to speak to you this afternoon to give you a
16 ruling on the class certification motion and to set a schedule
17 for this case going forward, particularly with respect to the
18 submission of a notice. And let me describe the principles of
19 law I'm going to be applying in ruling on this motion.

20 We have here a motion to certify the class on the
21 state law labor law claims, and it was fully submitted on June
22 9th. And the principles governing a determination of this
23 motion are well known, and the parties are in agreement as to
24 what they are, I believe. In essence, I have to be persuaded,
25 based on all the relevant facts and the applicable legal

987GPEFC

1 standard, that the plaintiff has shown, through evidence, that
2 it has satisfied each of the requirements under Rule 23(a)
3 and (b) (3) in this case to justify certification of the class.

4 We have a class that is seeking certification of
5 various labor law claims, failure to pay the minimum wage,
6 failure to pay overtime, what is referred to as a spread of
7 hours pay claim and also an illegal deduction claim. The
8 plaintiff worked at the defendant for roughly a year, from
9 November 2006 to November 2007, and besides offering his own
10 evidence, I also have evidence from one other former employee,
11 a Mr. Peralta, P-E-R-A-L-T-A, who asserts that he was not paid
12 overtime for his period of employment with the defendant.

13 I have also reviewed the deposition transcript, at
14 least those excerpts that were provided to me, from a
15 Mr. Dafnos, D-A-F-N-O-S, who was responsible for preparing the
16 time sheets that were submitted to the defendant's accountant
17 for preparation of the wage and hour reports. And that
18 evidence altogether shows that the defendant kept no
19 contemporaneous time records at all. Instead, it was the
20 uniform practice for all of the employees that Mr. Dafnos would
21 once a week fill out a piece of paper in which he would write
22 how many hours an individual had worked that week. And he had
23 basically two sources of information. He had the weekly
24 schedule of the hours they were supposed to have worked that
25 week and his own memory, as refreshed by conversations with

987GPEFC

1 other people in management. He admitted he wasn't always
2 there. He relied on what people told him. There were no daily
3 records. There were no records at all of when people came or
4 went. And so once a week he created a record.

5 He had, among other things, never heard about his
6 obligations or the employer's obligations in certain respects.
7 For instance, he'd never heard of the concept about spread of
8 hours pay, even when it was explained to him, not using the
9 term itself but with an explanation of what the term
10 encompasses. So we have an evidentiary showing and opposition
11 by the defendant with respect to certain features of the
12 showing.

13 In the first instance, the defendant contends that
14 class certification should not be granted because the plaintiff
15 has failed to show that joinder would not be adequate in this
16 case or sufficient. Under Rule 23(a), I have to find that the
17 numerosity of the putative class makes joinder of all class
18 members impracticable. It doesn't have to be impossible, but
19 the difficulty or inconvenience of joining all members of the
20 class must make use of the class action appropriate, and
21 numerosity is presumed when a class consists of 40 members.
22 And here, it's undisputed that, given the time period that's
23 involved and the size of the workforce, that the plaintiff has
24 shown that over 50 members potentially belonged to this class,
25 and I accept that as a sufficient showing of numerosity. That

987GPEFC

1 makes joinder really not a practical solution in this case.

2 Turning to the next issue, whether there's a common
3 question of law or of fact, I also find that the plaintiff has
4 satisfied this showing. Of course, as we know, even a single
5 common legal or factual question will suffice to meet this
6 requirement, and here, the plaintiff has satisfied me that
7 there are numerous common questions of law and of fact. With
8 respect to the legal issues, the existence of the violations
9 themselves and each of the elements of the asserted violations
10 are common issues of law for the class.

11 In terms of the common factual issues of the class, we
12 have a single process, as described by Mr. Dafnos, that was
13 utilized to determine the time each employee worked for the
14 entire week, and that will be a single factual issue as to
15 whether or not that process was reliable or sufficient.

16 The next issue is the requirement that the claims of
17 the members of the proposed class must be typical, in the sense
18 that they arise from the same course of events and that each
19 class member will, in all likelihood, be making similar legal
20 arguments to prove the defendant's liability. And for the
21 reasons I've already described here, that is met when analyzed
22 in terms of legal arguments and factually with respect to how
23 the time records were maintained or determined in this case.

24 The defendant makes an argument that with respect to
25 one of the claims, that is, the issue of whether or not there

987GPEFC

1 were improper deductions, that that's an issue that only
2 applies to the named plaintiff and not to the rest of the
3 putative class members. First of all, I don't think that is
4 the plaintiff's theory, as asserted in the complaint. But
5 beyond that, given the description by Mr. Dafnos of how he
6 determined wages and hours in this case, essentially, I expect
7 that there will be one process that applied to all putative
8 class members for imposing deductions or applying deductions
9 from their pay.

10 With respect to adequacy of representation,
11 plaintiff's counsel has shown that he is sufficiently
12 qualified, experienced and able to conduct this litigation.
13 And I don't find that there's been any significant question
14 raised as to whether the plaintiff's interests are antagonistic
15 to the interests of the other class members, and therefore,
16 that requirement has also been shown as met.

17 Turning to the predominance inquiry, which is often
18 the most important component of this analysis, I have to decide
19 if the issues in the class action that are subject to
20 generalized proof and, thus, applicable to the class as a whole
21 or will not predominate over those issues that are subject only
22 to individualized proof, and in this connection the defendant
23 makes a couple of arguments. Again, he reiterates the issue of
24 the illegal deductions and whether that's going to apply to a
25 single personal loan, that is, the named plaintiff. He points

1 to issues of damages which will require each class member's
2 damages to be separately calculated and shown. And he makes a
3 more general observation that the employees at the defendant
4 fell into two categories, that is, the tipped employees and the
5 nontipped employees.

6 And with respect to that last issue, I think it's
7 premature for me to decide if subclasses were necessary.
8 Perhaps, if a settlement were reached, I'd have to reach that
9 issue, or when it comes time for damages, we'd have to look at
10 that again, but I'm satisfied that, as of now, when we're
11 primarily focused on discovery and proof of liability, that a
12 single class will be sufficient. And essentially, for the
13 reasons I've already covered, I do find that the common issues
14 will predominate, the issues of liability and the issues of
15 proof to get us there.

16 It appears, again, that there was a common system to
17 determine weekly pay that applied to all individual employees,
18 that no records were kept to give us the contemporaneous time
19 or record of employment day in and day out, and I think the
20 individual issues primarily concerning damages do not defeat --
21 resort to the class action mechanism here. This is a case in
22 which it typically would be appropriate, and is not unusual to
23 find that a class should be certified.

24 I think that leaves us with the final issue, which is
25 superiority of the class action, particularly with respect to

1 the (b) (3) requirements, and I'm confident that in this case
2 this is the superior way to proceed for the reasons outlined in
3 Rule 23(b). And no question has been made with respect to any
4 of those particular components of the analysis.

5 Finally, the defendant argues that the notice that the
6 plaintiff, Mr. Kirschenbaum, has submitted is deficient in
7 various ways, and what I'd like to do is to ask counsel to
8 confer and get me a revised proposed notice or objections, if
9 there isn't agreement, in a week. Is that agreeable,
10 Mr. Kirschenbaum?

11 MR. KIRSCHENBAUM: Oh, that's fine with me, your
12 Honor.

13 THE COURT: Is that agreeable, Mr. Forman?

14 MR. FORMAN: Yes. That will be fine.

15 THE COURT: Okay. Good. And then, with respect to
16 the litigation as a whole, I know that the discovery has been
17 ongoing because of the underlying claims here, and now we know
18 that we'll be sending out a notice certifying this class and
19 that will include -- am I correct, Mr. Kirschenbaum? -- a
20 period for the putative class members to opt out?

21 MR. KIRSCHENBAUM: Yes, your Honor.

22 THE COURT: So I would ask you, Mr. Kirschenbaum, to
23 give me a letter with a submission next Friday that has a
24 proposal of dates for publication and the opt-out period and --

25 MR. KIRSCHENBAUM: I'm sorry, your Honor. A proposal

1 of dates for publication of?

2 THE COURT: Of the class action notice.

3 MR. KIRSCHENBAUM: Okay.

4 THE COURT: And for the opt-out period.

5 MR. KIRSCHENBAUM: Okay.

6 THE COURT: You know, the dates that you would like to
7 be included in the notice.

8 MR. KIRSCHENBAUM: Okay.

9 THE COURT: Good. And, counsel, where do we stand on
10 the status of discovery?

11 MR. KIRSCHENBAUM: This is Mr. Kirschenbaum. I'm
12 assuming that now that the class is certified, there might be a
13 need for a little bit of a broader discovery pertaining to the
14 class as a whole?

15 THE COURT: Well, why don't you meet and confer,
16 counsel, and address that issue with hopefully a joint proposal
17 for the remainder of the litigation in this case --

18 MR. KIRSCHENBAUM: Okay.

19 THE COURT: -- in next Friday's letter. Is that
20 agreeable?

21 MR. KIRSCHENBAUM: That's okay here.

22 MR. FORMAN: Yes. That's fine for the defendant.

23 THE COURT: Okay. Good. Thank you very much,
24 counsel.

25 MR. KIRSCHENBAUM: Your Honor, should we submit a

1 proposed order?

2 THE COURT: That would be good.

3 MR. KIRSCHENBAUM: Okay.

4 MR. FORMAN: Can I order the transcript for defendant?

5 THE COURT: Yes. Well, I'll permit you to contact the
6 court reporters office and do that.

7 MR. FORMAN: Thank you.

8 MR. KIRSCHENBAUM: I'll submit the proposed order
9 together with my letter on Friday. Is that okay?

10 THE COURT: Yes, Mr. Kirschenbaum.

11 MR. KIRSCHENBAUM: Okay. Thank you, your Honor.

12 THE COURT: Thank you.

13 000

14

15

16

17

18

19

20

21

22

23

24

25